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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No.3)

TONGUE RIVER RAILROAD CO.–CONSTRUCTION
AND OPERATION–WESTERN ALIGNMENT

Decided: May 15, 2003

By separate petitions filed on March 31, 2003, in this sub-numbered proceeding (Tongue River III), the United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board (UTU-GCA/MT), jointly, and the Northern Plains Resource Council, Inc. (Northern Plains) (collectively, petitioners) asked us to reconsider our decision served on March 11, 2003 (March 11 Decision).[1] In that decision, we authorized the Tongue River Railroad Company (TRRC or Railroad) to file supplemental evidence to update the record on the transportation aspects of its so-called Western Alignment construction application. We will deny the petitions.

BACKGROUND

An extensive description of the background of this proceeding is set forth in the March 11 Decision under appeal here, and we need not repeat it in detail. It is sufficient to note that TRRC has previously been authorized to construct 89 miles of rail line between Miles City and Ashland, MT,[2] and to construct a contiguous 41-mile line from Ashland to Decker, MT.[3] This proceeding involves an

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[1] Although petitioners submitted separate pleadings, Northern Plains explicitly adopts UTU-GCA/MT's arguments. Northern Plains also raises a few other minor issues, but for the most part merely reiterates its previous arguments with regard to improper segmentation of TRRR's three construction proposals, discussed infra. We have previously addressed the segmentation issue, and need not do so again. In light of Northern Plains' specific adoption of UTU-GCA/MT's arguments and the similarities between the issues raised in the separate petitions, we will not separately address Northern Plains' petition.

[2] See Tongue River R.R.–Rail Construction and Operation–In Custer, Powder River and Rosebud Counties, MT, Finance Docket No. 30186 (ICC served Sept. 4, 1985, modified May 9, 1986) (Tongue River I).

[3] See Tongue River Railroad Company–Rail Construction and Operation–Ashland to Decker,

(continued...)

alternate route (the Western Alignment) to the route we previously approved (the Four Mile Creek Alternative) for the southernmost 17.3-mile portion of the Ashland to Decker line in Tongue River II. In the decision setting a procedural schedule for Tongue River III, served June 23, 1998, we stated that we would not make any rulings on the merits of TRRC's Western Alignment proposal until after the environmental review process is completed, and that we will then address both transportation and environmental issues. The initial evidentiary record on these matters was completed on November 2, 1998, after numerous pleadings and replies had been submitted on the merits of this application.

Concurrently, the Board's Section of Environmental Analysis (SEA) began the environmental review process.[4] Before SEA could complete a Draft SEIS, however, TRRC asked SEA, on March 2, 2000, to suspend its environmental work. That request triggered a two and one-half year hiatus in any action on the Tongue River III application. On December 19, 2002, TRRC advised SEA that it was now in a position to move forward and asked SEA to resume its environmental review of the application.[5]

On January 17, 2003, TRRC requested that we permit it to update its previously submitted evidence on the transportation aspects of the Tongue River III application. In the March 11 Decision, we authorized TRRC to file the updated evidence. We also stated that a procedural schedule for

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[3](...continued)
Montana, Finance Docket No. 30186 (Sub-No. 2) (STB served Nov. 8, 1996) (Tongue River II). That decision is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit (Northern Plains Resource Council, Inc., et al. v. Surface Transportation Board, No. 97-70037 (9th Cir. filed Jan. 7, 1997)). Judicial review is being held in abeyance pending resolution of the Tongue River III application.

[4] On July 10, 1998, SEA issued a notice of intent to prepare a supplemental environmental impact statement (SEIS) to address the proposed new routing, and a final scoping notice was published in the Federal Register on February 3, 1999. That notice specified that the SEIS would evaluate the Western Alignment in full, as well as refinements to the alignments previously considered in Tongue River I and Tongue River II, where there have been significantly changed circumstances indicating that what was done before is no longer adequate.

[5] SEA served a notice, published in the Federal Register on March 26, 2003 (68 FR 14741-42) that announced that the environmental review of the Tongue River III application would go forward, solicited comments from the public on the final scope of the SEIS, and asked whether the public has any new environmental information to include in the SEIS. The notice asked for comments by May 12, 2003, after which SEA will issue an amended final scope setting forth the issues to be discussed in the SEIS.

replies would be established after TRRC filed its evidence. TRRC filed its updated evidence on May 1, 2003, and we will issue a procedural schedule in the near future.

Petitioners now seek reconsideration of that decision. TRRC has replied to the petitions for reconsideration.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a petition for reconsideration of a Board decision will be granted only if the petitioner shows that (1) the prior action will be "affected materially" because of "new evidence or changed circumstances" or (2) the prior action involves "material error." Petitioners have not met either of these standards.

UTU-GCA/MT's arguments are primarily addressed to two issues. First, it claims it has been denied due process because of inadequate notice and inaccurate descriptions of these proceedings in the March 11 Decision. Second, UTU-GCA/MT claims that we erred in stating that this proceeding is governed by 49 U.S.C. 10901(c), as modified by the ICC Termination Act of 1995 (ICCTA),[6] rather than by the pre-ICCTA version of section 10901(c).

UTU-GCA/MT raises three arguments in support of its inadequate notice argument. First, it complains that we changed the caption identifying this proceeding in the March 11 Decision, and that this was confusing and misleading. Second, UTU-GCA/MT complains that we failed to expressly invite members of the public to submit a request to be placed on the service list of the proceeding in the March 14, 2003 Federal Register notice summarizing that decision. Lastly, UTU-GCA/MT argues that we mischaracterized the case history in the Federal Register notice by stating that the line proposed in the Tongue River III application will "connect" to, rather than "substitute" for, the line we approved in Tongue River II.

These arguments have no merit. Although the caption in the March 11 Decision is not exactly the same as the caption in some of the 1998 decisions in Tongue River III,[7] the docket number and applicant's name remain the same. Further, both our decision and the Federal Register notice specify that TRRC would be filing supplemental evidence, and that any interested party could file replies after a

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[6] Pub. L. No. 104-88, 109 Stat. 803 (1995).

[7] UTU-GCA/MT notes that we changed the caption for Tongue River III from Tongue River Railroad Company-Construction and Operation-In Rosebud and Big Horn Counties, MT in our June 23, 1998 decision to Tongue River Railroad Co.-Construction and Operation-Western Alignment in the March 11 Decision.

procedural schedule is established. Moreover, on March 26, 2003, SEA published a notice in the Federal Register, which further served to alert the public of the resumption of the Tongue River III proceeding.

Finally, we did not err in stating that the Four Mile Creek Alternative would connect with a section of the line authorized in Tongue River II. That decision describes alternative proposals for the southern end of the line, and the reference to a connection correctly described the relationship between the two alternative construction options, on the one hand, and, on the other, the remainder of the line approved in Tongue River II. Nothing in the notice was misleading. The notice provided complete information about these matters and informed interested persons that they will be able to participate in the proceeding and will have ample opportunity to reply to TRRC's updated information.

UTU-GCA/MT also claims that the March 11 Decision creates an improper distinction between the transportation-related issues and the environmental aspects of this case. The petitioner seems to be under the misapprehension that we are precluding TRRC from supplementing the record regarding the environmental issues raised in this proceeding.[8] To the contrary, the SEIS will reflect updated information on the environmental aspects of TRRC's alternate construction proposal, but that information is properly presented in the context of the environmental review process that is being conducted by SEA.[9]

We must examine a construction application to determine whether it meets the statutory standards. We must also consider potential significant environmental impacts in deciding whether to approve a railroad construction proposal as submitted, deny the proposal, or approve it with mitigating conditions. Our practice of fulfilling these obligations through a bifurcated process in which SEA takes the lead in assessing the environmental issues, after which we make a decision on the merits, taking into consideration both transportation-related concerns and SEA's environmental analysis, is fully consistent

[8] UTU-GCA/MT states (at 9) "The March 11, 2003 decision distorts and misstates TRRC's petition, and imposes a rigid demarcation between "transportation" and "environmental" aspects of this case, and rules that TRRC's supplemental evidence will not address "any of the environmental issues raised in this proceeding," which . . . will be conducted concurrently by the Board's SEA." Similarly, Northern Plains claims that the Board will be considering stale environmental evidence.

[9] SEA made it clear in its March 26, 2003 Federal Register notice that it will consider in the Draft SEIS any environmental implications of the supplemental evidence TRRC and other interested parties present.

with NEPA[10] and our longstanding practice. See City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). This approach does not in any way diminish our capacity to consider environmental matters when we issue a decision following the completion of environmental review; the grant of rail construction authority can become effective only if we find the construction proposal to be warranted after taking into account environmental considerations. No construction may begin until we have made that final decision in which the environmental issues raised in the proceeding are fully considered.

UTU-GCA/MT's second principal contention is that this proceeding is governed by the pre-ICCTA version of 49 U.S.C. 10901(c), rather than by section 10901(c) as modified by that Act.[11] UTU-GCA/MT argues that the proceeding was pending in 1995, that TRRC sought to reopen it in 1997, and thus that the savings provision of ICCTA applies.[12] This assertion is incorrect.

The Tongue River III proceeding was not pending in 1995. Rather, TRRC filed the instant construction application in April 1998, after the Board had rejected TRRC's separate request to reopen Tongue River II, and over two years after ICCTA was enacted. Thus, the savings clause, which governs the handling of cases pending before the ICC at the time ICCTA was enacted, does not apply to the Tongue River III proceeding. That this case deals with a proposed modification to a license issued in a decision prior to the enactment of ICCTA does not alter this result.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU-GCA/MT's and Northern Plains' petitions for reconsideration are denied.

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[10] National Environmental Policy Act of 1969, 42 U.S.C. 4321-43.

[11] In amending section 10901 in ICCTA, Congress shifted the analysis from whether a construction project is consistent with the public convenience and necessity to whether the project is inconsistent with the public convenience and necessity. See Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, 3 S.T.B. 847, 864 (1998).

[12] Section 204 of ICCTA provides that matters arising prior to the effective date of the ICCTA will be governed by the provisions of the Interstate Commerce Act (ICA) as it stood prior to amendment by the ICCTA. 109 Stat. 822-29, 942.

2. This decision is effective on its service date.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary